

AMENDED IN ASSEMBLY JUNE 23, 2005

AMENDED IN SENATE MAY 3, 2005

AMENDED IN SENATE APRIL 18, 2005

AMENDED IN SENATE MARCH 29, 2005

SENATE BILL

No. 706

Introduced by Senator Ortiz

February 22, 2005

An act to amend Sections 1871.7, 1879.3, and 12921.8 of the Insurance Code, relating to the Insurance Commissioner.

LEGISLATIVE COUNSEL'S DIGEST

SB 706, as amended, Ortiz. Insurance Commissioner: enforcement.

Existing law provides that it is unlawful to knowingly employ runners, cappers, steerers, or other persons to procure clients or patients to perform or obtain services or benefits pursuant to specified provisions of law, or to procure clients or patients to perform or obtain services or benefits under a contract of insurance or that will be the basis for a claim against an insured individual or his or her insurer. Existing law allows a district attorney, the Insurance Commissioner, or any interested person to bring a civil action for a violation of these provisions.

This bill would require, in an action brought by an interested person, that the parties serve the commissioner and the local district attorney, *within a certain period*, with complete copies, ~~signed by the parties, of any settlement of the action, and would provide that no settlement shall be binding and enforceable until 25 days after the settlement has been served on the commissioner of all settlement agreements for actions brought under these provisions.~~ The bill would provide that, if

the commissioner has *brought or* proceeded with an action on or after January 1, 2006, and prior to January 1, 2011, the commissioner shall be entitled to reasonable attorneys' fees and costs in addition to any judgment. ~~The bill would require that the penalties not awarded to a private party, after satisfaction of the amount of reasonable attorneys' fees and costs incurred by the commissioner, be deposited in the General Fund and, upon appropriation, be apportioned as specified a court, if the commissioner has proceeded with an action, and if other specified conditions are met, to determine the allocation of any judgment or settlement according to a specified priority.~~

Existing law requires the commissioner to appoint full-time attorneys and supervisory and investigatory personnel within the fraud division of the Department of Insurance.

This bill would delete the reference to full time, and would require the commissioner, in addition, to assign staff counsel who are employed by the department and are under the supervision of the department's general counsel to advise the department's fraud division and for other specified purposes.

Existing law allows the commissioner to issue a cease and desist order, and to impose a fine in a specified amount, against any person acting as, or holding himself or herself out as, an insurance agent or broker without being so licensed, and against any person holding out that person as transacting, or transacting, the business of insurance without having been issued a certificate of authority.

This bill would revise the circumstances in which the commissioner may issue a cease and desist order for acts of this type, and would revise the amount of the fine that may be imposed, as specified. The bill would prohibit the commissioner from imposing a fine against a person who has, without a license, acted in a capacity for which a license or registration was required, or against a person who aided or abetted such a person, unless the conduct was in intentional or clearly negligent disregard of the requirement for a license or registration.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1871.7 of the Insurance Code is
2 amended to read:

1871.7. (a) It is unlawful to knowingly employ runners, cappers, steerers, or other persons to procure clients or patients to perform or obtain services or benefits pursuant to Division 4 (commencing with Section 3200) of the Labor Code or to procure clients or patients to perform or obtain services or benefits under a contract of insurance or that will be the basis for a claim against an insured individual or his or her insurer.

(b) Every person who violates any provision of this section or Section 549, 550, or 551 of the Penal Code shall be subject, in addition to any other penalties that may be prescribed by law, to a civil penalty of not less than five thousand dollars (\$5,000) nor more than ten thousand dollars (\$10,000), plus an assessment of not more than three times the amount of each claim for compensation, as defined in Section 3207 of the Labor Code or pursuant to a contract of insurance. The court shall have the power to grant other equitable relief, including temporary injunctive relief, as is necessary to prevent the transfer, concealment, or dissipation of illegal proceeds, or to protect the public. The penalty prescribed in this paragraph shall be assessed for each fraudulent claim presented to an insurance company by a defendant and not for each violation.

(c) The penalties set forth in subdivision (b) are intended to be remedial rather than punitive, and shall not preclude, nor be precluded by, a criminal prosecution for the same conduct. If the court finds, after considering the goals of disgorging unlawful profit, restitution, compensating the state for the costs of investigation and prosecution, and alleviating the social costs of increased insurance rates due to fraud, that such a penalty would be punitive and would preclude, or be precluded by, a criminal prosecution, the court shall reduce that penalty appropriately.

(d) The district attorney or commissioner may bring a civil action under this section. Before the commissioner may bring that action, the commissioner shall be required to present the evidence obtained to the appropriate local district attorney for possible criminal or civil filing. If the district attorney elects not to pursue the matter due to insufficient resources, then the commissioner may proceed with the action.

(e) (1) Any interested persons, including an insurer, may bring a civil action for a violation of this section for the person and for the State of California. The action shall be brought in the

1 name of the state. The action may be dismissed only if the court
2 and the district attorney or the commissioner, whichever is
3 participating, give written consent to the dismissal and their
4 reasons for consenting.

5 (2) A copy of the complaint and written disclosure of
6 substantially all material evidence and information the person
7 possesses shall be served on the district attorney and
8 commissioner. The complaint shall be filed in camera, shall
9 remain under seal for at least 60 days, and shall not be served on
10 the defendant until the court so orders. The local district attorney
11 or commissioner may elect to intervene and proceed with the
12 action within 60 days after he or she receives both the complaint
13 and the material evidence and information. If more than one
14 governmental entity elects to intervene, the district attorney shall
15 have precedence.

16 (3) The district attorney or commissioner may, for good cause
17 shown, move the court for extensions of the time during which
18 the complaint remains under seal under paragraph (2). The
19 motions may be supported by affidavits or other submissions in
20 camera. The defendant shall not be required to respond to any
21 complaint filed under this section until 20 days after the
22 complaint is unsealed and served upon the defendant.

23 (4) Before the expiration of the 60-day period or any
24 extensions obtained under paragraph (3), the district attorney or
25 commissioner shall either:

26 (A) Proceed with the action, in which case the action shall be
27 conducted by the district attorney or commissioner.

28 (B) Notify the court that it declines to take over the action, in
29 which case the person bringing the action shall have the right to
30 conduct the action.

31 (5) When a person or governmental agency brings an action
32 under this section, no person other than the district attorney or
33 commissioner may intervene or bring a related action based on
34 the facts underlying the pending action unless that action is
35 authorized by another statute or common law.

36 (f) (1) If the district attorney or commissioner proceeds with
37 the action, he or she shall have the primary responsibility for
38 prosecuting the action, and shall not be bound by an act of the
39 person bringing the action. That person shall have the right to

1 continue as a party to the action, subject to the limitations set
2 forth in paragraph (2).

3 (2) (A) The district attorney or commissioner may dismiss the
4 action notwithstanding the objections of the person initiating the
5 action if the person has been notified by the district attorney or
6 commissioner of the filing of the motion, and the court has
7 provided the person with an opportunity for a hearing on the
8 motion.

9 (B) The district attorney or commissioner may settle the action
10 with the defendant notwithstanding the objections of the person
11 initiating the action if the court determines, after a hearing, that
12 the proposed settlement is fair, adequate, and reasonable under
13 all the circumstances. Upon a showing of good cause, the hearing
14 may be held in camera.

15 (C) Upon a showing by the district attorney or commissioner
16 that unrestricted participation during the course of the litigation
17 by the person initiating the action would interfere with or unduly
18 delay the district attorney's or commissioner's prosecution of the
19 case, or would be repetitious, irrelevant, or for purposes of
20 harassment, the court may, in its discretion, impose limitations
21 on the person's participation, including, but not limited to, the
22 following:

- 23 (i) Limiting the number of witnesses the person may call.
- 24 (ii) Limiting the length of the testimony of those witnesses.
- 25 (iii) Limiting the person's cross-examination of witnesses.
- 26 (iv) Otherwise limiting the participation by the person in the
27 litigation.

28 (D) Upon a showing by the defendant that unrestricted
29 participation during the course of the litigation by the person
30 initiating the action would be for purposes of harassment or
31 would cause the defendant undue burden or unnecessary expense,
32 the court may limit the participation by the person in the
33 litigation.

34 (3) If the district attorney or commissioner elects not to
35 proceed with the action, the person who initiated the action shall
36 have the right to conduct the action. If the district attorney or
37 commissioner so requests, he or she shall be served with copies
38 of all pleadings filed in the action and shall be supplied with
39 copies of all deposition transcripts, at the district attorney's or
40 commissioner's expense. When a person proceeds with the

1 action, the court, without limiting the status and rights of the
2 person initiating the action, may nevertheless permit the district
3 attorney or commissioner to intervene at a later date upon a
4 showing of good cause.

5 (4) If at any time both a civil action for penalties and equitable
6 relief pursuant to this section and a criminal action are pending
7 against a defendant for substantially the same conduct, whether
8 brought by the government or a private party, the civil action
9 shall be stayed until the criminal action has been concluded at the
10 trial court level. The stay shall not preclude the court from
11 granting or enforcing temporary equitable relief during the
12 pendency of the actions. Whether or not the district attorney or
13 commissioner proceeds with the action, upon a showing by the
14 district attorney or commissioner that certain actions of discovery
15 by the person initiating the action would interfere with a law
16 enforcement or governmental agency investigation or
17 prosecution of a criminal or civil matter arising out of the same
18 facts, the court may stay discovery for a period of not more than
19 180 days. A hearing on a request for the stay shall be conducted
20 in camera. The court may extend the 180-day period upon a
21 further showing in camera that the agency has pursued the
22 criminal or civil investigation or proceedings with reasonable
23 diligence and any proposed discovery in the civil action will
24 interfere with the ongoing criminal or civil investigation or
25 proceedings.

26 (5) Notwithstanding subdivision (e), the district attorney or
27 commissioner may elect to pursue its claim through any alternate
28 remedy available to the district attorney or commissioner.

29 ~~(g) (1) (A) If the district attorney or commissioner proceeds~~

30 (g) (1) (A) (i) If the district attorney proceeds with an action
31 brought by a person under subdivision (e), that person shall,
32 subject to subparagraph (B), receive at least 30 percent but not
33 more than 40 percent of the proceeds of the action or settlement
34 of the claim, depending upon the extent to which the person
35 substantially contributed to the prosecution of the action.

36 (ii) *If the commissioner has brought an action or has*
37 *proceeded with an action brought by another person under this*
38 *section on or after January 1, 2006, and prior to January 1,*
39 *2011, the commissioner shall be entitled to attorney's fees and*
40 *costs in addition to any judgment, regardless of the date that*

1 judgment is entered. The court shall determine and award the
2 commissioner the amount of reasonable attorney's fees,
3 including, but not limited to, reasonable fees for time expended
4 by attorneys employed by the department and for costs incurred.
5 Any attorney's fees or costs awarded to the commissioner and
6 collected shall be deposited in the Insurance Fund. In cases in
7 which the commissioner has intervened, the commissioner and
8 the person bringing the claim may stipulate to an allocation. The
9 court may allocate the funds pursuant to the stipulation if, after
10 the court's ruling on objection by the district attorney, if any, the
11 court finds it is in the interests of justice to follow the stipulation.

12 (iii) If the commissioner has proceeded with an action, if there
13 is no stipulation regarding allocation, and if a judgment has been
14 obtained or a settlement has been reached with the defendants,
15 the court shall determine the allocation, upon motion of the
16 commissioner or the person bringing the action, according to the
17 following priority:

18 (I) The person bringing the action, regardless of whether that
19 person paid money to the defendants as part of the acts alleged
20 in the complaint, shall first receive the amount the court
21 determines is reasonable for attorney's fees, costs, and expenses
22 that the court determines to have been necessarily incurred.

23 (II) The commissioner shall receive the amount the court
24 determines for reasonable attorney's fees and costs.

25 (III) If the person bringing the suit has paid moneys to the
26 defendants as part of the acts alleged in the complaint, that
27 person shall receive the amount paid to the defendants.

28 (IV) At least 30 percent, but not more than 40 percent, of the
29 remaining assets or moneys, shall be allocated to the person
30 bringing the action, depending upon the extent to which the
31 person substantially contributed to the prosecution of the action.

32 (iv) Those portions of a judgment or settlement not distributed
33 pursuant to this subdivision shall be paid to the General Fund of
34 the state and, upon appropriation by the Legislature, shall be
35 apportioned between the Department of Justice and the
36 Department of Insurance for enhanced fraud investigation and
37 prevention efforts.

38 (B) Where the action is one that the court finds to be based
39 primarily on disclosures of specific information, other than
40 information provided by the person bringing the action, relating

1 to allegations or transactions in a criminal, civil, or
2 administrative hearing, in a legislative or administrative report,
3 hearing, audit, or investigation, or from the news media, the court
4 may award those sums that it considers appropriate, but in no
5 case more than 10 percent of the proceeds, taking into account
6 the significance of the information and the role of the person
7 bringing the action in advancing the case to litigation.

8 (C) Any payment to a person under subparagraph (A) or under
9 subparagraph (B) shall be made from the proceeds. The person
10 shall also receive an amount for reasonable expenses that the
11 court finds to have been necessarily incurred, plus reasonable
12 attorney's fees and costs. All of those expenses, fees, and costs
13 shall be awarded against the defendant.

14 (2) (A) If the district attorney or commissioner does not
15 proceed with an action under this section, the person bringing the
16 action or settling the claim shall receive an amount that the court
17 decides is reasonable for collecting the civil penalty and
18 damages. Except as provided in subparagraph (B), the amount
19 shall not be less than 40 percent and not more than 50 percent of
20 the proceeds of the action or settlement and shall be paid out of
21 the proceeds. The parties shall serve the commissioner and the
22 local district attorney with complete copies, ~~signed by the parties,~~
23 ~~of any and all settlements of actions brought under this article.~~
24 ~~No settlement shall be binding and enforceable until 25 days~~
25 ~~after the settlement has been served on the commissioner. of any~~
26 ~~and all settlement agreements for actions brought under this~~
27 ~~article at least 10 days prior to filing any motion with the court~~
28 ~~under this paragraph.~~

29 (B) If the person bringing the action, as a result of a violation
30 of this section has paid money to the defendant or to an attorney
31 acting on behalf of the defendant in the underlying claim, then he
32 or she shall be entitled to up to double the amount paid to the
33 defendant or the attorney if that amount is greater than 50 percent
34 of the proceeds. That person shall also receive an amount for
35 reasonable expenses that the court finds to have been necessarily
36 incurred, plus reasonable attorney's fees and costs. All of those
37 expenses, fees, and costs shall be awarded against the defendant.

38 ~~(C) If the commissioner has proceeded with an action under~~
39 ~~this section on or after January 1, 2006, and prior to January 1,~~
40 ~~2011, the commissioner shall be entitled to attorneys' fees and~~

~~costs in addition to any judgment, regardless of the date that judgment is entered. The court shall determine the amount of reasonable attorneys' fees, including, but not limited to, reasonable fees for time expended by attorneys employed by the department, and for costs incurred. Any attorneys' fees or costs awarded to the commissioner and collected shall be deposited in the Insurance Fund. The penalties not awarded to a private party, after satisfaction of the amount of reasonable attorneys' fees and costs incurred by the commissioner, shall be deposited in the General Fund and, upon appropriation by the Legislature, shall be apportioned between the Department of Justice and the Department of Insurance for enhanced fraud investigation and prevention efforts.~~

(3) If a local district attorney has proceeded with an action under this section, one-half of the penalties not awarded to a private party, as well as any costs awarded shall go to the treasurer of the appropriate county. Those funds shall be used to investigate and prosecute fraud, augmenting existing budgets rather than replacing them. All remaining funds shall go to the state and be deposited in the General Fund and, when appropriated by the Legislature, shall be apportioned between the Department of Justice and the Department of Insurance for enhanced fraud investigation and prevention efforts.

(4) Whether or not the district attorney or commissioner proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of this section, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. The dismissal shall not prejudice the right of the district attorney or commissioner to continue the action on behalf of the state.

(5) If the district attorney or commissioner does not proceed with the action, and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorney's fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(h) (1) In no event may a person bring an action under subdivision (e) that is based upon allegations or transactions that are the subject of a civil suit or an administrative civil money

1 penalty proceeding in which the Attorney General, district
2 attorney, or commissioner is already a party.

3 (2) (A) No court shall have jurisdiction over an action under
4 this section based upon the public disclosure of allegations or
5 transactions in a criminal, civil, or administrative hearing in a
6 legislative or administrative report, hearing, audit, or
7 investigation, or from the news media, unless the action is
8 brought by the Attorney General or the person bringing the
9 action is an original source of the information.

10 (B) For purposes of this paragraph, “original source” means an
11 individual who has direct and independent knowledge of the
12 information on which the allegations are based and has
13 voluntarily provided the information to the district attorney or
14 commissioner before filing an action under this section which is
15 based on the information.

16 (i) Except as provided in subdivision (j), the district attorney
17 or commissioner is not liable for expenses that a person incurs in
18 bringing an action under this section.

19 (j) In civil actions brought under this section in which the
20 commissioner or a district attorney is a party, the court shall
21 retain discretion to impose sanctions otherwise allowed by law,
22 including the ability to order a party to pay expenses as provided
23 in Sections 128.5 and 1028.5 of the Code of Civil Procedure.

24 (k) Any employee who is discharged, demoted, suspended,
25 threatened, harassed, or in any other manner discriminated
26 against in the terms and conditions of employment by his or her
27 employer because of lawful acts done by the employee on behalf
28 of the employee or others in furtherance of an action under this
29 section, including investigation for, initiation of, testimony for,
30 or assistance in an action filed or to be filed under this section,
31 shall be entitled to all relief necessary to make the employee
32 whole. That relief shall include reinstatement with the same
33 seniority status the employee would have had but for the
34 discrimination, two times the amount of backpay, interest on the
35 backpay, and compensation for any special damages sustained as
36 a result of the discrimination, including litigation costs and
37 reasonable attorney’s fees. An employee may bring an action in
38 the appropriate superior court for the relief provided in this
39 subdivision. The remedies under this section are in addition to
40 any other remedies provided by existing law.

1 (l) (1) An action pursuant to this section may not be filed
2 more than three years after the discovery of the facts constituting
3 the grounds for commencing the action.

4 (2) Notwithstanding paragraph (1) no action may be filed
5 pursuant to this section more than eight years after the
6 commission of the act constituting a violation of this section or a
7 violation of Section 549, 550, or 551 of the Penal Code.

8 SEC. 2. Section 1879.3 of the Insurance Code is amended to
9 read:

10 1879.3. The commissioner shall appoint supervisory and
11 investigatory personnel within the bureau. In addition, the
12 commissioner shall assign staff counsel who are employed by the
13 department and are under the supervision of the department's
14 general counsel to advise the department's fraud division, and to
15 further the purposes of this article and Article 1 (commencing
16 with Section 1871). The attorneys' duties may include
17 representing the commissioner and the department in civil
18 lawsuits pursuant to Article 1 (commencing with Section 1871).
19 Those persons shall be qualified by training and experience to
20 perform the duties of their position.

21 When so requested by the commissioner, the Attorney General
22 may assign one or more deputy attorneys general to assist the
23 commissioner in the performance of these duties.

24 SEC. 3. Section 12921.8 of the Insurance Code is amended to
25 read:

26 12921.8. (a) The commissioner may do the following:

27 (1) Issue a cease and desist order to a person who has acted in
28 a capacity for which a license, registration, or certificate of
29 authority from the commissioner was required but not possessed.

30 (2) Issue a cease and desist order to a person who has aided or
31 abetted a person described in paragraph (1).

32 (3) Impose a monetary penalty, pursuant to an order to show
33 cause, on a person described in paragraph (1) or (2). The
34 monetary penalty shall be the greater of the following:

35 (A) Five times the amount of money received by the person
36 for acting in the capacity for which the license, registration, or
37 certificate of authority was required but not possessed.

38 (B) Five thousand dollars (\$5,000) for each day the person
39 acted in the capacity for which the license, registration, or
40 certificate of authority was required but not possessed. In the

1 absence of contrary evidence, it shall be presumed that a person
2 continuously acted in a capacity for which a license, registration,
3 or certificate of authority was required on each day from the date
4 of the earliest such act until the date those acts were
5 discontinued, as proven by the person at a hearing.

6 (b) Notwithstanding paragraph (3) of subdivision (a), the
7 commissioner shall not impose a monetary penalty *under this*
8 *section* on a person ~~who has, without a license, acted in a~~
9 ~~capacity for which a license or registration was required pursuant~~
10 ~~to Chapter 5 who has held a license or registration within the~~
11 ~~prior five years pursuant to Chapter 5~~ (commencing with Section
12 1621), Chapter 6 (commencing with Section 1760), Chapter 7
13 (commencing with Section 1800), or Chapter 8 (commencing
14 with Section 1831) of Part 2 of Division 1, ~~or a person who aided~~
15 ~~or abetted such a person, unless the conduct was in intentional or~~
16 ~~clearly negligent disregard of the requirement for a license or~~
17 ~~registration.~~ 1.

18 (c) A person to whom a cease and desist order or order to
19 show cause has been issued, may, within seven days after service
20 of the order, if a hearing has not already been scheduled by the
21 commissioner, request a hearing by filing a request for the
22 hearing with the commissioner. The hearing shall be conducted
23 in accordance with the Administrative Procedure Act (Chapter
24 3.5 (commencing with Section 11340), Chapter 4 (commencing
25 with Section 11370), Chapter 4.5 (commencing with Section
26 11400), and Chapter 5 (commencing with Section 11500) of Part
27 1 of Division 3 of Title 2 of the Government Code), and the
28 commissioner shall have all the powers granted therein.

29 (d) A person who has a hearing pursuant to subdivision (c)
30 shall be entitled to have the proceedings and the order of the
31 commissioner reviewed by means of any remedy provided by the
32 Administrative Procedure Act (Chapter 3.5 (commencing with
33 Section 11340), Chapter 4 (commencing with Section 11370),
34 Chapter 4.5 (commencing with Section 11400), and Chapter 5
35 (commencing with Section 11500) of Part 1 of Division 3 of Title
36 2 of the Government Code).